FIFTH DIVISION September 29, 1995
Cons. Nos. 1-94-4061 & 1-95-1401

IN THE ILLINOIS APPELLATE COURT
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	Appeal from Circuit Court of Cook County.
v.	No. 92-MC1-416129
JOHN KOTSIAS, Defendant-Appellant.	The Honorable William P. O'Malley, Judge Presiding.

ORDER

Defendant, John Kotsias, appeals his conviction of domestic battery, for which he received a 364-day jail term. During the pendency of this appeal, defendant filed a post-conviction petition in the circuit court of Cook County, which was denied. Defendant subsequently appealed that denial, and this court consolidated both appeals. For reasons which follow, we affirm the circuit court's judgment.

Defendant's conviction arose from three incidents of spousal abuse which occurred in the summer of 1992. The victim, Cheryl Kotsias, testified that at 6:00 a.m. on July 30, 1992, defendant struck her back, legs, arms and shoulders 12 to 15 times with a three foot "dowel rod." She further recounted that on August 6, 1992, she and defendant returned to their apartment after grocery shopping. While the couple were unpacking groceries from the car, one of the bags slipped from Cheryl's hand. Defendant then came over to Cheryl and punched her in the eye with his fist. According to Cheryl, a neighbor, Heather Landers, came out from her apartment and asked defendant why he was hitting Cheryl and demanded that he stop.

Finally, on September 23, 1992, defendant "slugged Cheryl in the face

while she was feeding the couple's infant son, Daniel. Defendant hit her three to four more times in this manner. She then ran to a neighbor's apartment and reported the incident to authorities. Two days later, she entered a shelter for battered women.

During cross-examination, Cheryl admitted that she had experienced some emotional problems during the time period in question. These emotional problems related to Daniel's circumcision. Apparently, Daniel developed some medical problem after the circumcision had been performed, and Cheryl suffered from depression from it. She acknowledged that she had tried to jump from a third story window and had been admitted into three different psychiatric units. Cheryl also stated that she knew the martial art of Tai Chi. Both she and defendant gave

classes in Tai Chi.

Anna Landers testified that she called police to her apartment on July 30, 1992, when she heard Cheryl's screams at 6:30 a.m. She also saw defendant punch Cheryl in the face on August 6, 1992. Landers' daughter, Heather, ran out and confronted defendant about the incident.

Heather Landers stated that she saw defendant punch Cheryl on August 6, 1992. Heather ran outside and told defendant to stop. Defendant told Heather that he did not punch Cheryl.

Chicago police officer Culver investigated Anna Landers' report to the police and went to the Kotsias' apartment on July 30, 1992. Defendant answered the door and explained to Culver that "he was having some trouble with his wife." Defendant also told Culver that his wife had been mentally ill and sometimes needed

to be restrained. Culver informed defendant that Culver was obligated to see Cheryl and speak to her alone. Defendant became reluctant and uncooperative, but eventually capitulated. When alone, Cheryl told Culver that defendant had hit her. According to Culver, Cheryl appeared emaciated and bruised. However, she declined Culver's assistance in either leaving the apartment or formalizing charges.

Michelle Dolan, a case worker at Cook County Supportive Services, testified that she had interviewed defendant with regard to his divorce case in April 1993. During the interview, defendant admitted that he struck Cheryl once with a dowel rod in order to prevent her from hurting herself.

Defendant testified that he met Cheryl in 1976 when she was a student in his Tai Chi class. The couple lived

together for five years and married in 1983. Their son, Daniel, was born in 1992. Daniel was circumcised about eight days after his birth. Cheryl fainted during the circumcision when she saw blood. According to defendant, Cheryl was not the same person that he had known from that date forward. She began to hallucinate and attempted suicide several times. After the suicide attempts, defendant brought Cheryl to a hospital for psychiatric treatment.

Defendant admitted to striking Cheryl once with a dowel rod sometime in the late spring of 1992. He did so because Cheryl was "wielding" a knife while both defendant and Daniel were nearby. Defendant stated that he merely tried to use the dowel rod to strike the knife from Cheryl's hand. He missed, however, and struck her across her ankle. Defendant

maintained that this was the only occasion on which he struck Cheryl.

As to the incidents at issue, defendant specifically denied striking Cheryl with the dowel rod on July 30, 1992. With respect to the August 6, 1992 incident, defendant testified that he, Cheryl, and Daniel had gone to the grocery store. As they were unloading the groceries from the car, defendant saw Cheryl "tugging" on the baby. However, she had not removed the safety belt and the baby's leg was being pulled against the belt. To stop Cheryl from hurting the baby, defendant flashed his hand across Cheryl's face, to distract her from the baby. Defendant insisted that he did not strike her and did not cause her any harm.

Defendant's mother testified in his behalf. She recalled visiting defendant and Cheryl in August 1992. During the

visit, Cheryl was in bed, with a blank look on her face.

Defendant's stepfather, Dr. E. J. Holland, also testified for defendant. Dr. Holland spoke with Cheryl within one week of her son's birth. Cheryl was upset and crying. She told Dr. Holland the baby was dead and that she had a hole in her stomach. She also told him that she wanted to kill herself.

Constance Jarman testified that defendant and Cheryl visited her in July 1992. Jarman characterized Cheryl as "catatonic." Cheryl had to be coaxed from the car. Jarman visited the couple during the first week of August 1992. Cheryl was in bed and refused to speak to anyone. When she did speak, she told Jarman, "The baby is dead. I killed the baby." Although Jarman reassured Cheryl that the baby was alive, Cheryl kept repeating that

the baby was dead.

Rita Baumgartner met defendant while a student in defendant's Tai Chi class. Baumgartner became a regular visitor to the Kotsias apartment during the summer of 1992. She recalled that Cheryl often appeared very thin and unkempt, but was never bruised. Cheryl told Baumgartner on several occasions that the baby was dead.

The jury returned a guilty verdict and the court continued the case for sentencing.

Defendant retained a new attorney for the post-trial proceedings. During the sentence hearing, defendant called several witnesses who testified to defendant's compassionate and nonviolent nature. The circuit court then imposed the previously noted 364 day jail term.

While this appeal was pending, defendant filed a post-conviction petition

in the circuit court. In that petition, defendant alleged that he received ineffective assistance of counsel in that his trial attorney (i) failed to ask for a self-defense instruction, (ii) failed to adequately investigate the case, and (iii) failed to object to testimony concerning prior bad acts purportedly committed by defendant. The circuit court denied the petition.

The sole issue before this court is whether defendant's counsel was so constitutionally deficient as to deprive defendant of his right to a fair trial. To that end, defendant asserts the same three-prong challenge to his trial attorney's effectiveness as he did in his post-conviction petition.

Generally, in order to establish ineffective assistance of counsel, a defendant must show that counsel's

representation fell below an objective standard of reasonableness and that a reasonable probability exists that, but for the error, the result would have been different. (Strickland v. Washington (1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052.) In adopting the Strickland standard, our supreme court noted the heavy burden defendant bears to overcome the strong presumption in favor of a finding that counsel's advocacy was not ineffective. (People v.Albanese (1984), 104 Ill.2d 504, 473 N.E.2d 1246.) Further, the determination of the reasonableness of trial counsel's actions must be evaluated from counsel's perspective at the time of the alleged error, without hindsight, in light of the totality of the circumstances. (Strickland v. Washington, 466 U.S. at 668, 80 L.Ed.2d at 674, 104 S.Ct. at

2052.) It is important to note, however, that courts may resolve ineffectiveness claims under the two-part Strickland test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance. People v. Erickson (1994), 161 Ill.2d 82, 90, 641 N.E.2d 455, cert. denied (1995), __ U.S. __, 131 L.Ed.2d 849, 115 S.Ct. 1956.

Defendant has not met his burden in establishing his claim with regard to his attorney's failure to tender an instruction based upon self-defense or defense of others. At trial, defendant testified on his behalf and denied hitting Cheryl on the dates in question.

Section 7-1 of the Criminal Code provides that "[a] person is justified in the use of force against another when and to the extent that he reasonably believes

that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." (720 ILCS 5/7-1 (West 1992.) By raising one of the justifiable use of force defenses, either self defense or defense of another, a defendant admits committing the act at issue, but claims legal justification for doing so. People v. Hawkins (1980), 88 Ill.App.3d 178, 410 N.E.2d 309.

The evidence presented by defendant in this case is simply insufficient to meet the minimal requirement of "some evidence" to warrant a self defense or

defense of another instruction. (People v. Bratcher (1976), 63 Ill.2d 534, 349 N.E.2d 31.) Defendant testified that he did not hit Cheryl with the dowel rod on July 30. He claimed he did not punch her in the face on August 6, but rather merely waved his hand in front of her to "distract" her from pulling on Daniel's leg. In his brief, defendant points to his own testimony regarding an earlier incident in which he did hit Cheryl in the ankle with the rod because she was "wielding" a knife. That incident, however, was not at issue in this case. If, however, as defendant asserted at trial, he never used force against Cheryl on the dates charged, then it logically follows that he could not have reasonably believed force was necessary to protect himself or his son. As this court has noted "raising the issue of self defense

requires as its sine qua non that defendant had admitted [the battery] as the basis for a belief that the exertion of such force was necessary." (People v. Lahori (1973), 13 Ill.App.3d 572, 577, 300 N.E.2d 761.) Because defendant denied committing the acts, his counsel was not ineffective in not seeking the instruction.

Defendant next identifies his trial attorney's failure to object to evidence concerning prior bad acts as a additional basis for a finding of ineffectiveness.

During the State's redirect examination of both Cheryl and Anna Landers, testimony was adduced about other incidents of defendant's abuse of Cheryl dating back to January 1992. Defendant states that none of the other beatings were alleged in the criminal complaints nor were they noted in the discovery,

which had been tendered to the defense.

Generally, evidence of other criminal acts is inadmissible if it is introduced merely to establish a defendant's propensity to commit crime. (People v. Richardson (1988), 123 Ill.2d 322, 528 N.E.2d 612.) Exceptions to this general rule exist, however. Such evidence will be admitted if is probative of motive, intent, identity, absence of mistake or accident or modus operandi. (People v. McKibbons (12983), 96 Ill.2d 176, 449 N.E.2d 821.) In those instances, the evidence may be considered for the limited purpose of the exception. The decision to admit the evidence is within the discretion of the circuit court. People v. Ward (1984), 101 Ill.2d 443, 455-56, 463 N.E.2d 696.

Here, the evidence would have been admissible as to defendant's intent and

absence of an innocent frame of mind. It tends to show that the acts in question were not performed innocuously, thus diminishing the credibility of defendant's version of events, particularly with regard to the August 6, 1992 incident. See e.g., People v. Gaither (1991), 221 Ill.App.3d 629, 582 N.E.2d 735.

Defendant maintains, however, that even if we were to find that the evidence was unobjectionable, counsel's performance was still deficient because he failed to ask for a jury instruction limiting the manner in which that jury was to consider the evidence.

As noted, evidence of prior bad acts may be introduced for certain limited purposes, but not to demonstrate that a defendant has a propensity to commit the crime charged. An attorney's failure to seek a limiting instruction when he is

entitled to one cannot be considered a matter of discretion or trial strategy. (People v. Markiewicz (1993), 246 Ill.App.3d 31, 48, 615 N.E.2d 869, appeal denied, 152 Ill.2d 571, 622 N.E.2d 1219.) Thus, such a failure demonstrates that an attorney's performance was deficient, but it does not prove the second Strickland prong, that the attorney's poor performance prejudiced the defendant to such an extent that he was denied a fair trial. (People v. Hooker (1993), 253 Ill.App.3d 1075, 1085, 625 N.E.2d 1081.) Generally, the only instructions necessary to ensure a fair trial include the elements of the crime charged, the presumption of innocence, and the question of burden of proof. People v. Turner (1989), 128 Ill.2d 540, 562-63, 539 N.E.2d 1196, cert. denied, 493 U.S. 939, 107 L.Ed.2d 326, 110 S.Ct. 337.

In this case, the instruction did not implicate any of the above-noted areas. We further, note that the evidence in this case was not close. Cheryl's testimony regarding two of the charged incidents was corroborated by other witnesses. For example, neighbors heard Cheryl's cries on July 30 and called police to the scene. Officer Culver responded to the call and found Cheryl bruised. As to the August 6 incident, Heather Landers testified that she saw defendant hit Cheryl and confronted defendant at the scene. Based on the evidence, we cannot agree with defendant's contention that but for the instruction, the outcome of the trial would have been different.

Defendant next argues that defense counsel failed to adequately investigate the crimes charged. He claims that had counsel done so, he would have discovered

that the location of the Landers' apartment rendered them unable to view the street where defendant allegedly punched Cheryl. Defendant also asserts that a proper pretrial investigation would have yielded hospital records which would have contradicted Cheryl's trial testimony. Defendant's post-conviction petition contains the affidavit of a defense investigator who swore that he had been in the Landers' apartment and could not view the street in the manner in which they had testified at trial. Photographs of the exterior of the apartment complex were attached to the petition as further demonstration of the investigator's statement as were hospital records from the facilities at which Cheryl had undergone psychiatric treatment.

We begin our discussion of this issue by noting that defendant's trial attorney

extensively cross-examined Anna and Heather Landers as to their ability both to see and hear what they testified as to having seen and heard. Counsel elicited from the witnesses the fact that their basement apartment had a limited view of the street. Nevertheless, both witnesses steadfastly maintained that they had seen defendant punch Cheryl from their windows. The photographs of the apartment which are attached to the post-conviction petition do not foreclose that these witnesses could not have seen what they testified to having seen. Thus, we cannot say that defense counsel's failure to investigate the scene undermines our confidence in the jury's verdict. See People v. Hobley (1994), 159 Ill.2d 272, 637 N.E.2d 992.

As to the hospital records, we note that defense counsel cross-examined Cheryl as to her psychiatric health and the

reasons for her despondency. She admitted that its root was in Daniel's birth and circumcision. She also blamed defendant's violent attacks on her for her mental problems. Although defendant correctly points out that the hospital reports do not contain any mention of defendant's violence toward Cheryl, we note that the reports predated the incidents charged in this case. Thus, the hospital reports do not contradict Cheryl's trial testimony as to three attacks at issue. For this reason, we cannot say trial counsel's failure to subpoena the records demonstrated prejudice sufficient to satisfy the Strickland standard.

Accordingly, defendant's conviction and the denial of his post-conviction petition are affirmed.

T. O'BRIEN, with COUSINS, P.J., and MCNULTY, J., concurring.

80174

ILLINOIS SUPREME COURT
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January 31, 1996

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No. 80174 - People State of Illinois, respondent, v. John Kotsias, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 22, 1996.